

REMARKS/ARGUMENTS

Presently, claims 1 and 6-18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,165,524 to Narayanaswamy et al. in view of U.S. Patent No. 6,312,741 to Navarro; claims 19 and 23-34 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Narayanaswamy et al. in view of Navarro; and claims 35-45 and 57-62 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Narayanaswamy et al. in view of Navarro and U.S. Patent No. 4,929,464 to Willyard et al.

Initially, it should be noted that claims 1, 19, 37 and 58 of the present application require an encapsulated acid having a mean particle size of about 150-840 microns. The Examiner admits that Narayanaswamy et al. does not teach a mean particle size of about 150-840 microns as claimed. The Examiner then turns to Navarro which teaches coated fumaric acid having a particle size from about 70 to 140 microns. This particle size is outside of the claimed range. Additionally, the coated fumaric acid particles of Navarro preferably have a coating melting point of above 125°F. In contrast, the present invention requires a **minimum** melting point of 150°F as set forth in claims 18, 24, 57 and 62. As none of the prior art teaches the minimum melting point as claimed or the particle size as claimed, no prima facie case of obviousness has been established for claims 1, 6-18, 19, 23-34, 37, 57, 58 and 59-62.

Particle Size

Apparently, the Examiner is of the opinion that since claim 1 (like independent claim 18) recites a range of “about 150 microns to about 840 microns” and Navarro discloses a particle size from about 70 microns to about 140 microns and that the word “about” allows for a size slightly above 140 microns and slightly below 150 microns, the ranges overlap. While the Applicant does agree that the word “about” is not claiming an exact number but rather some type of variation from the end points of the range, Applicant respectfully submits that the Examiner is expanding the word “about” from its

intended meaning. The courts have already ruled that “about” is not an arbitrary term but rather a flexible word with a meaning similar to “approximately” or “nearly.” See *Ex parte* Eastwood, 163 USPQ 316, 317 (Pat. Off. Bd. App. 1968). The courts have held that the term “about” must be determined based on the facts of the case, particularly the prior art verses invention disclosures. Navarro teaches particle size from about 70 to 140 microns, i.e., a 70 micron range. It would be unreasonable to assume that either the 70 micron value or 140 micron value could be expanded an additional 10 or more microns (approximately 15% for the 70 microns and 7% for the 140 microns) based on the word “about.” In fact, the Examiner’s attention is drawn to the Federal Circuit case of *Eiselstein v. Frank*, 52 F.3d 1035, 34 USPQ 2d 1467, 1468, 1471 (Fed. Cir. 1995) wherein claims reciting a nickel based alloy containing “the balance nickel with nickel constituting about 50 to about 60% of the alloy” were held not to include a nickel range of 45-55%. With this in mind, Applicant respectfully submits that the use of the word “about” clearly does not correlate in the upper end of 140 microns in Navarro overlapping with the lower end of 150 microns as presently claimed. In other words, a range of 70-140 microns is not “about” a range of 150-840 microns.

In regards to the Examiner’s second argument that one of ordinary skill in the art would have been motivated to modify particle size of the capsule depending on a desired thickness of the particle coating and the amount of substance contained therein, it would appear that the Examiner has actually provided no support for this type of motivation. Indeed, close review of Navarro indicates that tortilla dough made with a large sized mean particle size of 300 microns encapsulated fumaric acid particulates is particularly undesirable. The Examiner’s attention is drawn to Figure 1 of the Navarro patent clearly showing that line 8 provides for a much too low pH content. Note that the acid dissolution profile is important because the tortilla is pressed into shape at approximately 30 minutes and it is important for the dough to remain neutral at this time so that the pressed tortilla does not retract into a smaller shape. See the discussion in column 7, line 34 through column 7, line 60. Indeed, the only line that yields a very desired dissolution profile is line 2 corresponding with presumably a mean particle size of about 105

microns. See column 5, lines 30-35 and column 7, lines 27-29. In view of the test results set forth in Navarro explicitly stating that adding encapsulated fumaric acid particles in the size of 300 microns is considered highly undesirable, it is unclear why the Examiner would consider it obvious to use such particles. Indeed, in view of Navarro's explicit statement that the mean particle size coated dispersed fumaric acid particulate should be set at about 70-140 microns preferably about 80-130 microns, more preferably about 90-120 microns, and most preferably 105 microns, presumably it would be obvious to one of ordinary skill in the art to use a fumaric acid particulate size no greater than 140 microns and actually closer to 105 microns as that is the explicit teaching in column 3, lines 50-60. Any other size would be quite contrary to the teaching of the Navarro reference. It is simply amazing to the Applicant that, even though Navarro teaches that it is most preferable to use a mean particulate size of 105 microns and that using 300 microns is particularly bad, somehow the Examiner would come to the conclusion that it is obvious to use between 150 microns to about 840 microns. Therefore, Applicant respectfully submits that this rejection should be withdrawn.

Melting Point

In regard to the melting point of 150°F as set forth in the claims, the Examiner argues that Navarro actually teaches a range above 125°F as a melting point and thus encompasses the 150° claimed. Apparently, there has been a complete miscommunication between the Applicant and the Examiner. The Applicant has claimed a minimum melting point of 150°F. A melting point of 125°F is clearly below the minimum of 150°F and therefore does not anticipate or render obvious the minimum of 150°F. Even a melting point between 125° and 150°F would not be a minimum of 150°F. The Examiner is reminded that the claims do not claim a melting point of 150°F, but rather a minimum melting point of 150°F. This limitation is simply not met by the applied prior art.

In regard to claim 35, it would appear that the Examiner is using Narayanaswamy et al. as a base reference. The Examiner's position is apparently that Applicant's argument is attacking the references individually. Certainly, the statement "neither Narayanaswamy et al. nor Navarro teaches the step of deep frying batter and oil to produce a batter product having an internal cook temperature of 170°F as required by claim 35" was intended to address the references both individually and in combination. However, for clarity the Applicant wishes to restate this point. Neither Narayanaswamy et al. nor Navarro, whether taken singly or in combination, teaches the step of deep frying batter in oil to produce a fried bakery product having an internal cook temperature of about 170°F to about 230°F as required by claim 35. The Applicant specifically apologizes for this error and did not in any way intend to attack these references only individually. When viewed in this light, it should be clear that the applied combination cannot possibly meet these claim limitations.

Based on the above remarks, the Applicant respectfully submits that the present invention is patentably defined over the prior art of record such that allowance of all claims and passage of the application to issue are respectfully requested. Basically, the Examiner has not provided, either singly or in combination, the claimed subject matter. In particular, in the case of the micron size, the Examiner is using a reference directly contrary to its teaching. In the case of the melting point, the applied prior art does not disclose or render obvious a minimum melting point of 150°F. Therefore, these rejections should be withdrawn. If the Examiner should have any additional questions or

concerns regarding this matter, the Examiner is cordially invited to contact the undersigned at the number provided below in order to further prosecution.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Everett G. Diederiks, Jr.", written in a cursive style.

Everett G. Diederiks, Jr.
Attorney for Applicant
Registration No. 33,323

Date: January 6, 2009
DIEDERIKS & WHITELAW, PLC
12471 Dillingham Square, #301
Woodbridge, VA 22192
Tel: (703) 583-8300
Fax: (703) 583-8301